REVERSE and REMAND; and Opinion Filed May 10, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00283-CV

**EMPLOYEE SOLUTIONS MCKINNEY, LLC,
ESI/EMPLOYEE SOLUTIONS, L.P., AND ESI GENERAL, LLC, Appellants
V.
MICHAEL WILKERSON, Appellee**

**On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-04305**

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Brown

In this interlocutory appeal, appellants Employee Solutions McKinney, LLC, ESI/Employee Solutions, L.P., and ESI General, LLC challenge two trial court orders denying motions to compel arbitration. Because the arbitration agreement at issue delegated questions of arbitrability to the arbitrator, we reverse the trial court's orders denying the motions to compel and remand this case to the trial court for further proceedings consistent with this opinion.

BACKGROUND

After he suffered a workplace injury, Michael Wilkerson sued the three appellants for negligence. Appellant ESI/Employee Solutions, L.P. (Employee Solutions L.P.) is the parent company of eleven limited liability companies who provide temporary staffing solutions to third parties and do business as "Employee Solutions." One of the subsidiaries is appellant Employee

Solutions McKinney, LLC (ES McKinney). Appellant ESI General, LLC (ESI General) is Employee Solutions L.P.'s general partner.

Wilkerson was hired by an Employee Solutions entity in May or June of 2013. On June 4, 2013, Wilkerson signed an acknowledgement that he had been provided a copy of his employer's arbitration policy. The acknowledgement, titled "Employee Acknowledgement of Receipt of the Employee Solutions Arbitration Policy & Procedures [ESAPP]," contained the following statements:

> I have been provided a copy of the [ESAPP]. I understand that I should thoroughly read it.
>
> . . . .
>
> I understand that by continuing my employment (or by accepting future employment after receiving the [**ESAPP**]) I agree to submit to **binding arbitration** (under the [**ESAPP**]) any and all claims, disputes or controversies that exist now or later arise between me and my Employer and/or between me and any of its affiliated companies, employees, officers, partners, owners, clients and customers, including claims, disputes and controversies arising before, during and after my employment.[1]

The ESAPP is a six-page document effective February 1, 2013. It is signed by one individual as the authorized representative of eleven enumerated business entities, including all three appellants. The document initially states, "Your Employer (hereinafter simply "the **Company**") recognizes that disputes may arise between the Company and its employees . . . and that arbitration is a faster, less expensive but fair means of resolving disputes for all parties." Among other things, the ESAPP provides that, "**This agreement to arbitrate any and all disputes means YOU ARE AGREEING TO WAIVE to the maximum extent permitted by law ANY RIGHT YOU MAY HAVE to ask for a jury or court trial in any dispute with the**

[1] All forms of emphasis in this opinion appear in the original versions of the acknowledgement and the ESAPP.

Company." In a paragraph labeled "**EXAMPLES OF CLAIMS SUBJECT TO ARBITRATION**," the ESAPP provides:

> Claims and disputes covered by this [ESAPP] include, but are NOT limited to: (a) all claims and disputes that an employee of the Company may not have or may have in the future against the Company, and (b) all claims that the Company may presently have or may have in the future against the employee.
>
> By way of example, the claims covered by this [ESAPP] also include, but are NOT limited to, all: . . . negligence, negligence per se and gross negligence claims; . . . **and any and all claims challenging the existence, validity or enforceability of this [ESAPP] (in whole or in part) or challenging the applicability of this [ESAPP] to a particular dispute or claim.**

On November 22, 2013, Wilkerson was injured moving a heavy bale of wire while working at Encore Wire Corporation. According to Wilkerson, ES McKinney told him to stay home until he received a medical release, but he was soon fired for failing to report to work. On April 16, 2015, Wilkerson filed suit against the three appellants. He alleged he was hired by "an Employee Solutions entity, presumably Employee Solutions McKinney" and assigned to work at Encore Wire. Wilkerson alleged that appellants, who were nonsubscribers to workers' compensation insurance, were negligent per se for several reasons, including failing to provide him a safe workplace.[2]

Employee Solutions L.P. filed an original answer subject to a plea in abatement. Three days later, all three appellants filed a joint first amended answer, and later a second amended answer, both also subject to a plea in abatement. Each time, appellants asserted that the parties had entered into a mutual agreement to arbitrate that required all disputes arising out of the employment relationship to be resolved by an arbitrator.

[2] Wilkerson also sued Encore Wire, but eventually nonsuited it.

In May 2015, the trial court set the case for a non-jury trial on May 16, 2016. In August 2015, appellants served various notices of intention to take depositions by written questions, asking Wilkerson's medical providers to produce medical and other records.

On January 28, 2016, Employee Solutions L.P. filed a motion to compel arbitration. Employee Solutions L.P. asserted that prior to Wilkerson's injury, he had signed the acknowledgement that he had received, understood, and agreed to the company's arbitration policy and procedure. Employee Solutions L.P. further asserted that Wilkerson's negligence claims fell squarely within the scope of that agreement. It attached to the motion an affidavit from its custodian of records and copies of the ESAPP and Wilkerson's acknowledgement.

In response, Wilkerson maintained that the court should deny the motion to compel for several reasons. First, he asserted the arbitration agreement was not enforceable. He also contended that Employee Solutions L.P. had waived its right to arbitrate the dispute. Finally, Wilkerson asserted that the arbitration agreement was unconscionable. In an attached affidavit, Wilkerson stated that he was never provided a copy of the ESAPP.

On February 11, 2016, the trial court denied Employee Solutions L.P.'s motion to compel arbitration. Although the court's order does not specify a basis for its ruling, the court cited *Adams v. Staxxring, Inc.*, 344 S.W.3d 641 (Tex. App.—Dallas 2011, pet. denied), a case in which this Court held that a defendant waived his right to arbitration by substantially invoking the judicial process. Appellants timely filed a notice of appeal from that order.

One week later, ES McKinney filed a motion to compel arbitration. ES McKinney asserted that it, not Employee Solutions L.P., was actually Wilkerson's employer.[3] ES

[3] The motion indicates that at the hearing on Employee Solutions L.P.'s motion to compel, which is not part of our record, an issue arose as to which of the three Employee Solutions defendants actually employed Wilkerson. Appellants argued that it did not matter which one of them actually employed Wilkerson, because all were parties to the ESAPP. The court suspended the hearing and ordered the parties to conduct discovery to resolve the issue. ES McKinney said it gathered documents showing it, not Employee Solutions L.P., was Wilkerson's employer. Before ES McKinney received any discovery requests from Wilkerson, the trial court denied Employee Solutions L.P.'s motion to compel.

McKinney asserted a valid arbitration agreement existed and that Wilkerson's claims were subject to that agreement. ES McKinney attached an affidavit from its custodian of records and copies of the ESAPP and Wilkerson's signed acknowledgement. In addition, all appellants filed a motion to vacate the trial court's earlier order denying Employee Solutions L.P.'s motion to compel.

Wilkerson filed a response to ES McKinney's motion to compel similar to his response to Employee Solutions L.P.'s motion to compel. He again asserted that the arbitration provision was not enforceable, ES McKinney waived its right to arbitration, and that the agreement was unconscionable.

We abated the appeal to allow the parties the opportunity to be heard in the trial court on the second motion to compel. On April 14, 2016, after a hearing, the trial court denied ES McKinney's motion to compel and appellants' motion to vacate the February 11, 2016 order. We reinstated the appeal.

Appellants raise seven issues in this appeal complaining of the trial court's denial of the two motions to compel arbitration. They contend that under the terms of the arbitration agreement the trial court should have referred the issue of arbitrability to the arbitrator. They alternatively contend that both motions to compel should have been granted because Employee Solutions L.P. and ES McKinney each established there was a valid agreement to arbitrate Wilkerson's claims and Wilkerson did not meet his burden to prove a defense to arbitration. Wilkerson counters that the trial court could have properly denied arbitration on any of the defenses he raised. There is no dispute that Wilkerson's negligence claims fall within the scope of the ESAPP.

APPLICABLE LAW

The ESAPP provides for arbitration under the Federal Arbitration Act (FAA), and the parties do not dispute the application of the FAA. A party may bring an interlocutory appeal from an order denying a motion to compel arbitration under the FAA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.016 (West 2015); *see also* 9 U.S.C. § 16. We review an order denying a motion to compel arbitration under an abuse of discretion standard. *Carr v. Main Carr Dev., LLC*, 337 S.W.3d 489, 494 (Tex. App.—Dallas 2011, pet. denied). Under that standard, we defer to the trial court's factual determinations if they are supported by evidence, but we review the trial court's legal determinations de novo. *Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 862 (Tex. App.—Dallas 2010, no pet.).

A party seeking to compel arbitration under the FAA must establish that (1) there is a valid arbitration clause, and (2) that the claims in dispute fall within that agreement's scope. *In re Rubiola*, 334 S.W.3d 220, 223 (Tex. 2011) (orig. proceeding); *Seven Hills Commercial, LLC v. Mirabal Custom Homes, Inc.*, 442 S.W.3d 706, 715 (Tex. App.—Dallas 2014, pet. denied). If these two showings are made, the burden shifts to the party opposing arbitration to present a valid defense to the agreement. *Seven Hills*, 442 S.W.3d at 715.

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Roe v. Ladymon*, 318 S.W.3d 502, 510 (Tex. App.—Dallas 2010, no pet.). The United States Supreme Court has recognized a distinction between questions of substantive arbitrability, which courts decide, and procedural arbitrability, which courts must refer to arbitrators to decide. *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 520 (Tex. 2015) (citing *BG Grp., PLC v. Republic of Arg.*, 134 S.Ct. 1198 (2014)). Questions of substantive arbitrability, which concern the existence, enforceability, and scope of an agreement to arbitrate, are usually decided by the trial court. *Id.*

at 520–21; *see Saxa Inc. v. DFD Architecture Inc.*, 312 S.W.3d 224, 229 (Tex. App.—Dallas 2010, pet. denied). But the question of who has the primary authority to decide whether the parties are required to arbitrate turns upon the agreement of the parties. *Seven Hills*, 442 S.W.3d at 715. The parties may agree to submit matters of substantive arbitrability to arbitration. *Saxa, Inc.*, 312 S.W.3d at 229 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

When deciding whether parties agreed to arbitrate a certain matter, courts ordinarily apply state-law principles governing the formation of contracts. *Seven Hills*, 442 S.W.3d at 715. Courts should not assume that parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so. *Id.*; *see First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Silence or ambiguity about who should decide the arbitrability issue should not lead a court to presume the parties intended the issue to be decided by the arbitrator. *Saxa Inc.*, 312 S.W.3d at 229. Rather, a court must examine the arbitration agreement to decide if it evidences a clear and unmistakable intention that the arbitrator will have the authority to determine the scope of arbitration. *Id.*; *see In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005) (orig. proceeding).

ANALYSIS

Appellants' second issue is dispositive of this appeal. In it, they contend the trial court erred in failing to refer issues of arbitrability to the arbitrator. They contend that under the ESAPP, these issues were for the arbitrator to decide. They rely on the language in the ESAPP providing that "any and all claims challenging the existence, validity or enforceability" of the policy were to be submitted to arbitration. We agree.

In response to Employee Solutions L.P.'s and ES McKinney's motions to compel arbitration under the ESAPP, Wilkerson raised several defenses. First, he argued to the trial court that the arbitration provision was not enforceable because: (1) there is no evidence that the

version of the ESAPP Wilkerson acknowledged receiving in June 2013 was the February 1, 2013 version presented to the trial court; and (2) the term "Company" in the ESAPP was undefined other than as Wilkerson's employer. Wilkerson did not argue that he never acknowledged receiving an arbitration policy, merely that we cannot be sure this is the version he acknowledged. Wilkerson also asserted that Employee Solutions L.P. and ES McKinney waived their right to arbitrate by failing to satisfy the following conditions precedent contained in the ESAPP: (1) serving a written demand for arbitration on him and filing the demand with Dispute Solutions, Inc., and (2) mediating the dispute or obtaining written waiver of mediation. Next, Wilkerson argued that Employee Solutions L.P. and ES McKinney waived the right to arbitration by substantially invoking the civil process both procedurally and in discovery such that Wilkerson would be substantially prejudiced by arbitration. Finally, Wilkerson alleged the arbitration provision was substantively and procedurally unconscionable.

Wilkerson challenged the existence, validity, and enforceability of the ESAPP. *See G.T. Leach*, 458 S.W.3d at 520 (question of whether party has waived its right to arbitration by its conduct in litigation is just another way of asking whether there is presently enforceable arbitration agreement); *In re Poly-Am., L.P.*, 262 S.W.3d 337, 348 (Tex. 2008) (orig. proceeding) (unconscionable contracts are unenforceable under Texas law); *see also Seven Hills*, 442 S.W.3d at 722 (conditions precedent are for arbitrator to decide). Under the express terms of the ESAPP, "any and all claims challenging the existence, validity or enforceability" of the policy were to be submitted to arbitration. This provision is clear and unmistakable evidence of the parties' intent to delegate issues of arbitrability to the arbitrator. *See Saxa, Inc.*, 312 S.W.3d at 228–31 (parties agreed arbitrator would determine issues of substantive arbitrability by incorporation of Construction Industry Arbitration Rules of the AAA providing that arbitrator had power to rule on his or her own jurisdiction, including existence, scope, or validity of arbitration agreement);

Jody James Farms, JV v. The Altman Grp., Inc., 506 S.W.3d 595, 598–99 (Tex. App.—Amarillo 2016, pet. filed) (incorporation of AAA rule that arbitrator has power to determine existence or validity of contract of which arbitration clause forms a part constitutes clear and unmistakable evidence that parties agreed to arbitrate arbitrability).

In his brief, Wilkerson does not directly address appellants' argument about this language in the policy. Instead, citing our opinion in *Seven Hills*, Wilkerson responds that the trial court could have properly denied the motions to compel because there was clear proof a "strictly procedural requirement" had not been met. He argues that appellants did not comply with a requirement that they serve a written demand for arbitration on him and file the demand with Dispute Solutions, Inc. within the statute of limitations for negligence. Wilkerson acknowledges that questions of whether conditions precedent to arbitration have been fulfilled are generally left to the arbitrator. *See Seven Hills*, 442 S.W.3d at 722. He maintains, however, that because appellants failed to comply with a strictly procedural requirement, a narrow exception to the rule applies, and the court could have properly denied arbitration on this ground. But here, as in *Seven Hills*, the parties disagree about whether the condition precedent applied. *See id.* Appellants argue the provision requiring written demand for arbitration within the statute of limitations applied only to the initiation of arbitration of appellants' own claims, not here where Wilkerson has brought the claims. And, more importantly, the parties explicitly agreed that an arbitrator would determine all claims challenging the enforceability of the policy, which includes whether any conditions precedent were met. *See id*. at 722–23. Because the arbitration policy delegated issues of arbitrability to the arbitrator, we conclude the trial court erred in denying Employee Solutions L.P.'s and ES McKinney's motions to compel arbitration. We sustain appellants' second issue. In light of our resolution of this issue, we need not reach appellants' remaining issues.

Finally, we note that although ESI General is an appellant in this appeal, it never asked the court to compel arbitration, and the two trial court orders that are the subject of this appeal do not mention ESI General or deny it any relief. We thus provide no opinion or relief regarding ESI General because there was no order denying a motion to compel filed by that entity.

Accordingly, we reverse the trial court's orders denying the motions to compel and remand this case to the trial court for further proceedings consistent with this opinion.

/Ada Brown/
ADA BROWN
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EMPLOYEE SOLUTIONS MCKINNEY, LLC, ESI/EMPLOYEE SOLUTIONS, L.P., AND ESI GENERAL, LLC, Appellants

No. 05-16-00283-CV V.

MICHAEL WILKERSON, Appellee

On Appeal from the 134th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-15-04305.
Opinion delivered by Justice Brown; Justices Lang and Whitehill participating.

In accordance with this Court's opinion of this date, the trial court's February 11, 2016 and April 14, 2016 orders denying the motions to compel arbitration are **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellants Employee Solutions McKinney, LLC, ESI/Employee Solutions, L.P., AND ESI General, LLC recover their costs of this appeal from appellee Michael Wilkerson.

Judgment entered this 10th day of May, 2017.